Supreme Court, U.S.
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No. 99 966

In the

Supreme Court of the United States

October Term, 1999

Harold A. Julien,

Petitioner

vs.

COUNTY OF ALAMEDA, County of Alameda Office of Assessor; JOHN SCOTT; STEPHEN SARA; RONNIE THOMSEN; JOHN CLUGSTON; DARRYL EDWARDS; STEVE HUNTER

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Harold A. Julien, Pro Se
1907 109th Ave.
Oakland, California 94603
1-510-632-4021

72 pp

QUESTIONS PRESENTED

1. Are declarations in substantial compliance with 28 § 1746 in support of pro se litigants position, as a non-moving party or moving party, sufficient under Fed R Civ. P. 56?

2. Did the Ninth Circuit disregard existing well established substantive law in it's appellate review of matters herein to be a departure from "the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory powers"[Rule 10(a)] ?

PARTIES TO THE PROCEEDING

The parties identified in the caption were the parties to the proceedings below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

1. Decisions in the courts below are in conflict with this Court's well established precedence under Celotex v. Catratt ,and Anderson v. Liberty Lobby 5

2. Decisions of the courts below excluded Petitioner's declarations under 28 § 1746 7

3. The Ninth Circuit disregard for Doctrine of Stare Decisis.....9

CONCLUSION..... 13

APPENDIX

A Decision of the District Court.....1-A

B. Memorandum of the Ninth Circuit.....20-A

C. Denial of Petition for Rehearing 24-A

D. Excerpt form Discovery Order.....25-A

E. Affidavit of F. Jefferson 26-A

F. Affidavit of M. Tornheim 28-A

G. Petition for Rehearing.....29-A

H. Statutory Provision.....47-A

I. "Web" Case Excerpt.....52-A

TABLE OF CITATIONS

Page

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 248 (1986) 5,6

Celotex Corp. v. Catrett,
477 U.S. 317, 322 (1986). 5

Chevron Corp v. Pennzoil Co.
974 F.2d 1156, 1161 (9th Cir. 1992) 6

CFTC v. Topworth
9756590 8

Hardly v. U.S.,
45 F.3d 1345, 1348(9th Cir. 1995) 12

Herrington v. Sonoma Cty.
834 F. 2d 1244, 1503 (9th Cir. 1987) 11

Litkey v. U.S.
1114 S.Ct. 1147, 1158(1994) 11

Ortez v. Washington County, State of OR.
88 F. 3d 804 (9th Cir. 1996) 10

Pollack v. Pollack,
154 F.3d 601, 611 (6th Cir. 1998) 8

Richardson v. Oldham,
12 F.3d 1373, 1378(5th Cir. 1994) 6

Wallis v. J.R. Simplot Co.
26 F.3d 885, 889 (9th Cir. 1994) 6

Washington v. Garrett,
10 F. 3d 1421, 1422 (9th Cir. 1993) 10

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in the above entitled case.

OPINIONS BELOW

The order of the United States District Court for the Northern District of California dated July 17, 1998 is not officially reported and appears as Appendix A hereto. The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit dated July 12, 1999 appears as Appendix B hereto.

STATEMENT OF JURISDICTION

Petitioner timely filed a Petition for Rehearing with a Suggestion for Rehearing En Banc, a panel member voted for rehearing while the majority voted for a denial. The circuit court entered an order denying the petition on September 3, 1999; this order appears as Appendix C hereto. This petition is filed within ninety(90) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS

Relevant Statutory provisions are: 28 U.S.C. Rules Of Civil Procedure, Rule 36 - Requests for Admission; 28 U.S.C. Rules of Civil Procedure, Rule 56 - Summary Judgement: 56(c)

56(e), and 56(f); 28 U.S.C. Sec. 1746. Unsworn declarations under penalty of perjury; 42 U.S.C. Sec. 1983. Civil Action for deprivation of rights; and 42 USC Sec. 2000e-3. Other unlawful employment practices. Text of these statutory provisions are in Appendix G.

STATEMENT OF THE CASE

In the district court this action arose from allegations of patterns and practices of racial discrimination in the promotional process of the Office of Assessor for the County of Alameda in the State of California; the December 1994 promotions were the basis for the Petitioner's claim. In sum this claim asserted selection was pre-ordained given the testing process that allowed for selection or hiring interviews of all applicants regardless of test rating or rank. Further, this process negated the work experience of African-Americans who had more direct work experience, which was further negated by subjective selections criteria used by hiring officials; these are three named defendants to the action. The complaint alleges that in the decade prior to the 1994 promotions and the respondents do not dispute that one African-American was promoted to the position of Appraiser III. Such were alleged to have been in violation of Title VII and § 1983.

A second claim concerns retaliation in violation Title VII and § 1983, and in earlier stages of the proceeding below violations of 42 U.S.C. § 1981, § 1985 and § 1986 with respect to this claim. At it's

core this claim is that the Petitioner had suffered a five day suspension due to a variety of protected activities, and the respondents actions that lead to this disciplinary suspension was in violations of § 1985 and § 1986(conspiracy and failure to prevent, respectively). A hearing of the County of Alameda's Civil Service Commission produced an admission that is the quintessential dispostive fact of this case. A defendant, Sara, made the statement the petitioner had been disciplined for having made charges of racial discrimination, four pieces of evidence was presented to prove this fact.

In the district court Petitioner filed a motion for partial summary judgement with two affidavits on the quintessential material fact of the case; these affidavits had the concomitant effect of being in opposition to the Respondent motion for summary judgement. Of the district court rulings prior and subsequent to summary disposition, motions on discovery and recusal are at issue.

The quintessential material fact of the case is the statement of Sara. This was an admission on May 1, 1996 at the County of Alameda Civil Service Commission disciplinary hearing that Sara had in part imposed a five day suspension due to the Petitioner having made complaints of racial discrimination. In support of Petitioner's motion for partial summary judgement evidence from four sources were presented. Declarations by Jefferson and Tornheim who attended

the May 1, 1996 disciplinary hearing; pursuant to FRCP 36 admission to this fact that Sara made this statement; and a copy of the transcription of this hearing. In opposition the respondents(defendants) produced a declaration by Sara who reviewed Jefferson and Tornheim declarations and asserted they were incorrect and he did not make this statement. Appendix E(26-A), and F(28-A), respectively.

The district court excluded declarations of Jefferson, and Tornheim, ruled that a response for Request for Admission served on September 29, 1997 and responded to on November 19, 1997 was timely as a copy was given to the defense on September 31, 1997; and the hearing transcript supported the non-movant's position. Objections by the parties were filed as regard their respective oppositions to supporting declarations.

Objections were ruled on by the district court as follows:

> **" Both parties also filed motions objecting to evidence in the motions for summary judgement. The motions to strike the evidence need not be decided, because their resolution is immaterial to the determination of these motions for summary judgement."**

Earlier in the district court proceedings in a discovery dispute the district court upheld the discovery order of a magistrate judge. An odious finding of the magistrate judge is the following: " the fact that

the deputy on more than one occasion has been asked to remove plaintiff from meetings where he became disruptive." Appendix D[1]

Petitioner appealed summary disposition on claims under 42 U.S.C. § 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e with six named defendants; the denial of plaintiff's motion for partial summary judgement; rulings as regard what was termed an amended complaint to include six named defendants(others) and claims under 42 U.S.C.§§ 1981, 1983, 1985(3) and 1986; and motions in regard to discovery, costs, and recusal by the district court. The district court was affirmed.

The Circuit disposed of the appeal in a Memorandum.

REASONS FOR GRANTING THE WRIT

1. Decisions in the courts below are in conflict with this Court's well established precedence under Celotex v. Catratt, and Anderson v. Liberty Lobby.

Pursuant to FRCP Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v.

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[1] Pursuant to Rule 14 (h)(vi) only the relevant portion of the discovery order appears as Appendix D.

Catrett, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In sum, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

Ninth Circuit relevant standards on appellate review "the actual evidence offered by each party" is examined. Wallis v. J.R. Simplot Co. 26 F.3d 885, 889 (9th Cir. 1994); a district court is not entitled to weigh the evidence and resolve underlying factual issues. Chevron Corp v. Pennzoil Co. 974 F.2d 1156, 1161 (9th Cir. 1992). It appears these are based on Celotex and Anderson.

The district court excluded Jefferson and Tornheim's declarations and impermissible credited Sara's denial which was based on his(Sara) review of these declaration. Such is in obvious conflict with Celotex and Anderson, and Ninth Circuit case law. No case has been found where a defendant proffer assessments or credibility determinations of the opposing party's declarations and a court allows same to support granting a summary judgement motion.

It would appear axiomatic that Jefferson and Tornheim's presence as the May 1, 1996 hearing would be on "personal knowledge." Thus, sufficiently specific under FRCP 56(e).

Additionally, FRCP 56(f) notes that a court " may make such other order as is just."

Jefferson notes in her affidavit at Appendix 27-A

> **"At this Alameda County Civil Service disciplinary hearing Stephen Sara testified that Harold Julien had been disciplined in part for having file charges of racial discrimination."**

Tornheim notes at Appendix 28-A:

> **"Later in testimony by Stephen Sara, he said that the discipline was imposed in part because Mr. Julien had made complaints of racial discrimination."**

It would appear that these have the needed specificity required by FRCP 56(e) and as each was present personal knowledge.

2. Decisions of the courts below that excluded Petitioner's declarations under 28 § 1746.

No known case law prescribe an absolute adherence to the text of FRCP 56(e). A statuary exception is provided for in 28 U.S.C. § 1746; this issue has been addressed by various circuit courts.

In CFTC v. Topworth 9756590,[2] the Ninth Circuit ruled that a declaration made under laws of Hong Kong substantially complied with § 1746 and was a part of the record. In a Sixth Circuit decision, the inclusion of declarations was based on § 1746. Pollack v. Pollack, 154 F.3d 601, 611 (6th Cir. 1998) n. 20. In a Fifth Circuit decision with a detailed review of eleven affidavits two persuasive arguments relevant herein are made.

In this case the district court erred by excluding declarations but such was found harmless as "substantial rights" were not affected. Further, "non-moving affidavits should not be held to as strict standard as those of the movant for summary judgement." Richardson v. Oldham, 12 F.3d 1373, 1378(5th Cir. 1994).

As noted above in the district court the Petitioner's declaration had the dual effect of support of the plaintiff motion for partial summary judgement, and in opposition to defendants motion for summary judgement. The distinction is that these were excluded by the district court and the appellate court, and the "substantial rights" of the petitioner in the instant

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[2] Citation could not be found , it is published on the "web" at website http://laws.findlaw.com/9th/9756590.html. The relevant portion of this from the website appears in the Appendix at 52-A.

petition were affected, and the lack of evidentiary rulings further erodes these rights.

Jefferson's affidavit concludes with

> **"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this affidavit is executed in October 28, 1997 in Oakland, California."**

Tornheim's concludes with :

> **"I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this affidavit is executed on October 27, 1997 in Oakland, California."**

If not a part of the record under FRCP 56 it would appear that 28 U.S.C. § 1746 would apply.

3. The Ninth Circuit disregard the Doctrine of Stare Decisions.

A number of well established precedence were not followed in the courts below.

Credibility determinations are impermissible at the summary judgement under FRCP 56. In sum the credibility of

the testimony of Jefferson and Tornheim is a question for the trier of fact.

Although pro se litigants complaints and affidavits should be construed liberally they must produce evidence of material facts. ***See*** Washington v. Garrett, 10 F. 3d 1421, 1422 (9th Cir. 1993), and Ortez v. Washington County, State of OR. 88 F. 3d 804 (9th Cir. 1996). The customary review accorded pro se litigants did not occur in the courts below.

With respect to the issues of recusal, the central contentions was the district court cumulative prejudicial rulings; this was most evident in the magistrate judge discovery ruling upheld by the district court, and the hand written insertion of the term "primarily" in the district court summary deposition.[3] In petitioner's recusal motion, it was argued that the handwritten inclusion by the court suggested that the main contentions were other than alleged in the complaint; i.e. the thrust of the complaint concerned violation of § 1983 moreso than a promotional case under Title VII. A further effect was to obscure Sara's admission.

The second and more odious fact concern the acts of magistrate judge. The origins of following from a discovery is unknown " the fact that the deputy on more than one occasion has been asked to remove plaintiff from meetings where he became

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[3] In the Appendix at 1-A the word primarily is stated as ["primarily"] which is to note that in the actual order it was handwritten.

disruptive." The defendants have not advanced this finding as a basis for anything yet this is a "finding" of a federal judge. The central thrust of the plaintiff case was Sara's admission, contrary to the assertion of the district court. The handwritten assertion of the term "primarily" that the case was promotional precluded serious review of the § 1983 claims. As regard recusal, the Ninth Circuit standard is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might be reasonable questioned" Herrington v. Sonoma Cty., 834 F. 2d 1244, 1503 (9th Cir. 1987).

In the district court the " pervasive bias" exception was argued "that would render fair judgement impossible." Litkey v. U.S. 1114 S.Ct. 1147, 1158(1994)

The Ninth Circuit did not factually address any issue. In the Ninth Circuit memorandum disposition of the appeal, the major contentions were addressed by Footnotes 3 and 4 respectively. Footnote 3 asserts:

> " In granting defendants' motion for summary judgement, the district court properly denied Julien's motion for partial summary judgement which included the same issues."

As regard this issue, the motion for partial summary judgement addressed *retaliation for protected activity*, and violations 42 § 1983 for the imposition of the discipline by the

County of Alameda *inspite* of Sara's admission In sum this claim was not based on race discrimination; i.e., a retaliation(under Title VII or § 1983) claim does not stand or fall with a claim of race discrimination. These distinctions are obscured by this Footnote as well as the exclusion of Jefferson, and Tornheim declarations, and the credibility determination made by the district court in regard Sara's declaration.

Footnote 4

> "The district court did not abuse its discretion in granting defendants' motion to withdraw their admission, finding the answer timely filed. *See Hardly v. U.S.*, 45 F.3d 1345, 1348(9th Cir. 1995)."

As regard the Footnote Four , the underlying substance is the same as Footnote three. Although the district court has discretion under FRCP 36 to admit or deny these request, at best the district court made an implicit ruling that found timeliness. As noted above the Request for Admission were served on September 29, 1997 and responded to on November 19, 1997. Thus, the quintessential factual dispute of the case was assigned to footnotes.[4]

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[4] This Court's rule ask to include whatever material thought necessary to state one's case.(Rule 14(h)(vi). In many respects the Petition for Rehearing to the Ninth Circuit does this, and is most relevant to the second question of this Petition; it is in the Appendix at 29-A to 46-A.

The Ninth Circuit's determination does not comport with it's own decisions nor with well established practice in other circuits. The decisions in the lower courts urge the petitioner had no facts, material or otherwise, inspite of the record before it. These render no factual decisions to confront, confirm or review. In sum substantive law was not followed by the courts below.

CONCLUSION

For the foregoing reasons. It is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Dated: 12/1/99

Respectfully Submitted,

Harold A. Julien, Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HAROLD A. JULIEN, Plaintiff, v. JOHN N. SCOTT; STEPHEN SARA; RONNIE THOMSEN; JOHN CLUGSTON; DARRYL EDWARDS; STEVE HUNTER; COUNTY OF ALAMEDA, Defendants	No. C-96-1858 CAL ORDER: DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT; PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGEMENT

I.

Plaintiff Harold Julien is an employee of the defendant County of Alameda. He is an African American who brings this action claiming ["primarily"] that he was denied a promotion in 1994 because of his race. His claims include failure to promote and retaliation under Title VII, 42 U.S.C. § 2000e(2) and violation of his civil rights under 42 U.S.C. § 1983.

Defendants file this summary judgement motion on October 10, 1997, but the hearing was continued due to discovery issues. Plaintiff then filed a cross-motion for partial summary judgement on June 5, 1998. Defendants' opposition to plaintiff's motion for partial

summary judgement argues that plaintiff was untimely. However, this court is hearing plaintiff's motion on the merits because plaintiff is pro se and because the delay did not prejudice defendants.

Both parties also filed motions objecting to evidence in the motions for summary judgement. The motions to strike the evidence need not be decided, because their resolution is immaterial to the determination of these motions foe summary judgement.

The summary judgement motions have been briefed, argued and submitted before this court.

II.

Summary judgement is appropriate where no genuine issue exists as to any material fact and where the moving party is entitled to judgement as a matter of law. Fed. R. Civ. P. 56(c). The moving party the burden of establishing that there is no genuine issue of material fact. Id.; Celotex Corp. V. Catrett, 477 U.S. 317, 332-23(1986).

After the moving party makes a properly supported motion, the non-moving party has the burden of presenting facts showing a genuine fact issue. British Airways Board v. Boeing Co., 585 F.2d 946, 950-52(9th Cir. 1978). It is not enough for the non-moving party to point to the mere allegations or denials contained in the pleadings. Instead, he must set forth, by affidavit or other admissible evidence ,specific facts demonstrating the existence of an actual issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,252 (1986). Summary

judgement may be granted "[i]f the evidence is merely colorable ... or is not significantly probative." Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1288(9th Cir. 1987). In reviewing a motion for summary judgement, inferences are to be drawn in the light most favorable to the non-movant. Id. at 1289.

The court must construe pro se pleadings liberally and afford plaintiff benefit of the doubt. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623(9th Cir. 1988).

The court reviews the summary judgement motions under these standards.

III.

Plaintiff is an Appraiser II in the Real Property Appraisal Division of the Alameda County of Assessor's Office. He started in 1984 as an Appraiser I, and was automatically promoted to Appraiser II after a one-year probationary period. Promotion to Appraiser III is not automatic, but is a competitive process involving an examination to become an "eligible" applicant as well as an interview process. Position are filled only as they become available due to promotion or termination. Plaintiff first applied to be an Appraiser III in 1988, taking an eligibility examination with both written and oral portions, but was not promoted. This application for promotion is not at issue in this case.

A. Application Process for Promotion to Appraiser III

Plaintiff took the new eligibility examination in 1994, at which time the exam was purely oral, without a written portion(because of complaints regarding a breach of security allowing access to the written exam in 1988). The oral exam was conducted by three people who are not employees of Alameda County. Each of the fourteen applicants was ranked based on their exam results. Seven of the applicants were Caucasian four were African American, two were Asian, and one was Filipino. The highest score belonged to a Caucasian, second highest to an Asian, two people(an African American and a Caucasian) were tied for third ranking, and two were tied for fourth(an Asian applicant and plaintiff). The fifth through eight highest scores belonged to Caucasians, the ninth was Filipino, two people tied for tenth(a Caucasian and an African American) and the eleventh was an African American.

The next step in the selection process was an interview with an "oral selection board," consisting of County Assessor John Scott and two other supervising employees of the Assessor's Office, Ronnie Thomsen and John Clugston. Each candidate was asked the same set of questions, and the board selected the candidates they felt were most qualified based on the following criteria: (1) the board's knowledge of each eligible's work performance in the Office of Assessor, and (2) each eligible's responses to the questions asked during the interview.

Plaintiff criticized both the oral examination conducted by the non-County employees and the interview conducted by the oral

selection board, for lacking substance in terms of the applicant's knowledge of the job. But plaintiff acknowledged that the exam and interview applied to all test takers in this respect and that many candidates felt this way regardless of their race.

In November 1994 the selection board promoted the top five ranking applicants, except plaintiff. The board promoted two Caucasians, two Asians(one of whom was tied with plaintiff for the fifth highest exam score), and one African American. As more Appraiser III positions became available in January 1995, the next four eligibles were promoted, except plaintiff and the seventh ranking candidate, a Caucasian. In 1996, two promotions were given to the African American remaining on the list.

As a result, of the 14 applicants who took the 1994 exam, only plaintiff and two other Caucasians applicants did not receive promotions. Three African American, two Asians and one Filipino were promoted.

B. Stated Reasons for Failure to Promote

Defendant Scott explained that plaintiff was not promoted because those who were promoted had a work product that was equal or better in quality than plaintiff's, yet none of them were considered to be difficult to work with as plaintiff and all of them had demonstrated more of a "willingness and ability to work constructively within the department." Examples of plaintiff shortcomings are as follows:

(1) failure to utilize program that resulted in plaintiff doing a lot more work unnecessarily and requiring counseling,
(2) failure to follow written office policy of submitting mileage claim reports in a timely manner,
(3) insubordination in connection with a denial of a vacation request,
(4) willful disobedience in taking a day off after vacation request was denied,
(5) failure to follow instructions on filing out time sheets, and
(6) an incident of rudeness and disrespect towards a supervisor who inquired about a lengthy conversation between plaintiff and another employee.

The selection board concluded that plaintiff was difficult to work with, did not receive criticism well, became defensive, was not open to question about his work, and resisted direction or supervision.

C. Bases for Retaliation Claim "Assaults and Suspension

Plaintiff's retaliation claim is primarily based on two incidents involving a co-worker, which resulted in a five-day suspension of plaintiff. On November 9, 1999 defendant Steve Hunter, who had formerly been plaintiff's immediate supervisor, attempted to give plaintiff his performance evaluation from the previous fiscal year, July 1994-June 1995. Because plaintiff had filled grievance regarding his 1993-1994 evaluation, plaintiff refused to discuss the new evaluation with Hunter until the earlier evaluation process was complete. Plaintiff alleges, and defendants do not dispute, that defendant Hunter placed his hand on plaintiff's shoulder while speaking to him, as plaintiff was attempting to walk away. Plaintiff claims it was an attempt to physically restrict him and he labels it an "assault," though a witness said Hunter's behavior was reasonable.

On November 14, 1995 another incident occurred between plaintiff and Hunter. As plaintiff was walking in an office hallway with a cup of tea, Hunter approached from the opposite direction. The two bumped into one another, resulting in plaintiff' tea spilling. Plaintiff claims Hunter bumped into him on purpose despite plaintiff's attempt to dodge Hunter, and he labels this incident a second "assault and battery." Plaintiff immediately spoke with defendant Steve Sara to report the incident , at which time he told Sara that if he did not keep Hunter away from plaintiff, plaintiff would "take off Hunter's face." Because of plaintiff's threat, Sara contacted the County Crises Team, and an officer interviewed plaintiff and wrote a report of the incident and the threat. Sara later notified plaintiff that the department intended to suspend plaintiff for five days without pay bases on plaintiff's threat to Hunter. Plaintiff requested and received a Skelly hearing and a Civil Service Commission appeal, both of which upheld the suspension as a reasonable disciplinary action based on just cause.

Plaintiff also bases his retaliation claim in various other actions plaintiff has taken during his employment, including union activities, a grievance filed in 1993, and his EEOC complaint based on failure to promote in 1995.

Plaintiff's section 1983 claim, while not clearly explained, seems to be based on the Fourteenth Amendment(failure to promote based on plaintiff's race), due process(failure to promote, suspension,

interrogation by Crisis Team officer), Fourth Amendment(illegal search and seizure re: hand on shoulder incident of November 9, 1995) and First Amendment freedom of speech(discouraging employees from speaking to plaintiff).

IV.

A. Failure to Promote Claim

1. *Disparate Treatment*

To show disparate treatment, plaintiff must prove that defendants intentionally discriminated against him because of race. See Texas Dept. Of Comm. Affairs v. Burdine, 450 U.S. 248, 255(1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792(1973). Under a disparate treatment analysis, there is a serious of shifting of the evidentiary burdens that begins with the requirement that plaintiff establish a prima facie case of discrimination. To do so, plaintiff must establish that (1) he belongs to a racial minority; (2) he applied for and was qualified for the position sought; (3) he was rejected; and (4) the position remained open after his rejection and the employer continued to seek applications from other people with similar qualification to plaintiff. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 253. "If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another

motive which is discriminatory." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889(9th Cir. 1994).

Here, plaintiff meets the first three prongs for a prima facie case, since he is a member of a protected class and was qualified for the position of Appraiser III, but was not promoted. But plaintiff has not shown the fourth prong, since the selection board chose candidates whom they consider to be better qualified than plaintiff. Defendants have proffered legitimate, non-discriminatory reasons for not promoting plaintiff. Defendants provide evidence of plaintiff's shortcomings, including unwillingness to follow office policy and instructions, insubordination and other undesirable behavior.

The burden then shifts to plaintiff to show that these reasons for failing to promote him were only a pretext for a true discriminatory reason. Plaintiff does not do so. He fails to show any evidence that defendants discriminated against him because of his race. He does not identify any admissible evidence to suggest that race played any part in defendants' decision not to promote him. Plaintiff has provided no evidence that any defendant ever made any comment about plaintiff's race, or in any way intentionally discriminated against plaintiff because of his race. Plaintiff does not rebut defendants' evidence of a legitimate, non-discriminatory reason for failing to promote him, and so cannot prove discrimination under a disparate treatment theory.

2. Disparate Impact

In certain cases, discriminatory intent need not be shown since "facially neutral employment practices that have significant adverse effects on protected groups" can be the basis of a disparate impact Title VII claim. Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 986(1998); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Disparate impact cases usually focus on statistical disparities between the pool of qualified applicants and the group of those hired or promoted. A prima facie case of disparate impact requires plaintiff to show that a particular employment practice results in the exclusion of applicants because of their membership in a protected group. See Watson, 487 U.S. at 992.

Plaintiff argues that defendants' selection process is "subjective with criteria irrelevant to job duties or performance, pat or projected." But plaintiff acknowledges that both the oral exam and the interview applied equally to all test takers, regardless of race, and fails to indicate how the process excluded him because of his race. Further, plaintiff did well on the oral examination portion of the process, ranking fourth out of eleven ranking scores.

A statistical examination of the applicants for promotion to Appraiser III reveals that two of the top five ranking scores were African American and two were Asian. Thus, the oral examination did not exclude applicants because of their race. More importantly, the selection board promoted applicants for the most part

according to their ranking, except for plaintiff and two Caucasians who were not promoted. Of the 14 applicants. 7 were minorities. Of the 11 promoted, 6 were minorities, while only plaintiff and two Caucasians were not promoted. These statistics do not tend to show disparate impact. If anything, minorities fared better than Caucasian candidates in promotion to Appraiser III in 1994-1996.

Plaintiff attempts to show disparate impact by presenting statistics of new hires for Appraiser I as compared to the population of Alameda County. This comparison fails to identify those out of the general population who are qualified to be Appraiser. It is irrelevant to the issue of failure to promote to Appraiser III where the relevant applicant pool is the qualified "eligible" Appraiser II's who applied for promotion.

Plaintiff does not establish a prima facie case of disparate impact in the promotion process. Plaintiff has failed to provide any evidence that would indicate that he was intentionally discriminated against based of his membership in a protected class. And, there is no statistical disparity between the qualified pool of applicants for Appraiser III and those who were promoted that would tend to indicate disparate impact.

B. Retaliation Claim

Title VII prohibits retaliation against an employee for opposing any practice made unlawful by Title VII. 42 U.S.C. § 2000e-3(a). The order and allocation of proof is similar to that of a

disparate treatment analysis. Thus, to prove a prima facie case of unlawful retaliation, a plaintiff must establish that (1) he engaged in a protected activity, (2) he suffered adverse employment action, and (3) a causal link exists between the two events. Trent v. Valley Electric., 41 Fed. 524, 525(9th Cir. 1994). If he meets this burden and established a prima facie case, the burden of production shifts to defendants to articulate a legitimate, non-discriminatory reason for the termination. Miller v. Fairchild Industries, 797 F.2d 727, 730 (9th Cir. 1986); Wrighten v. Metropolitan Hospitals, Inc., 726 F.2d 1346, 1354 (9th Cir.1984). If defendants are successful, plaintiff has the ultimate burden to rebut by showing that the proffered explanation is a mere pretext, id., and the unlawful retaliation is the real reason behind the termination. St. Mary's Honor Center v. Hicks, 114 S. Ct. 2742, 2749 (1993).

Plaintiff' deposition testimony attempts to create a causal link between protected activities and his five day suspension. Plaintiff has filed numerous grievances and complaints, has been involved in union activities, and has alleged racial discrimination in promotion. Many of these activities are the sort protected by Title VII. But plaintiff shows no evidence to link these activities with his suspension. Plaintiff must establish that "but for" plaintiff's protected activity, he would not have suffered the adverse employment action. This plaintiff has failed to do.

Even if plaintiff could make out a prima facie case of retaliation, defendants have articulated a legitimate, non-discriminority reasaon for the suspension: plaintiff's behavior surronding the November 14 threat incident. Defendant Sara's two declarations state that he chose to suspend plaintiff because he found plaintiff's behavior inappropriate. Plaintiff not only threatened to "take Hunter's face off" if he came near plaintiff again, but told his coworkers in a loud and angry voice just after the collision to "keep that clown away from me." Sara found this behavior to be inappropriate and to deserve a five day suspension. Plaintiff receive both a Skelly hearing and a Civil Service Commission hearing, and both decided that the suspension was reasonable and appropriate.

Thus, defendants have articulated a legitimate, non-discriminatory business reason for discipline plaintiff. Plaintiff has not made any showing that would indicate that this reason for the suspension is a pretext for discrimination.

C. Section 1983 Claims

1. *Section 1983 Claims Against the County of Alameda*

Local governments are "persons" subject to liability under 42 U.S.C. § 1983 where official policy or custom causes a constitutional tort. Monell v. Dept of Social Servs., 436 U.S. 658, 690 (1978). Plaintiff appears to allege that the Alameda County Assessor's Office discriminated against him on the basis of race under a long-standing practice or custom which constitutes defendant' standard operating

procedure. See id at 691. To succeed on this cause of action, plaintiff must prove 'the existence of a widespread practice that ... is so permanent and well settled as to constitute a " custom or usage' with the force of law." Gillette v. Delmore, 979 F.2d 1342, 1349 (9th Cir. 1992). Proof of random acts or isolated incidents are insufficient to establish custom. Trevino v. Gates, 99 F.3d 9112, 918 (9th Cir. 1996); Thompson v. City of Los Angeles, 885 F.2d 1429, 1440 (9th Cir. 1989). " When one must resort to inference, conjecture and speculation to explain events, the challenged practice in not sufficient duration, frequency and consistency to constitute an actionable policy and custom." Trevino, 99 F.3d at 920.

Plaintiff must present evidence that a policy of defendant violates his constitutional rights in order to show a section 1983 claim. This plaintiff has failed to do. The defendant has no policy in place to discriminate against employees or applicants for promotion based on their race; nor is there a widespread practice of racial bias evident to establish a "custom or usage." Plaintiff's evidence consists mainly of his deposition testimony stating various supposed wrongs, such as a five -day suspension, sick day abuse warning, and other more subjective claims regarding defendant's alleged ill-treatment of plaintiff. But this "inference, conjecture and speculation" does not constitute a policy or practice of violating plaintiff's constitutional rights, even if his rights were in fact violated, which is addressed in the next section.

2. *Section 1983 claims Against Individual Defendants*

" In order to prove discrimination in violation of § 1983, a plaintiff must demonstrate that the defendants acted with the intent to discriminate. A plaintiff who fails to establish intentional discrimination for purposes of Title VII ... also fails to establish intentional discrimination for purposes of [section] 1983." Sischo-Nownejad v. Merced Community College, 934 F.2d 104, 112 (9th Cir. 1991).

Plaintiff argues that his equal protection rights were violated not only by failure to promote and his five day suspension, but also because someone allegedly stole his mileage claims forms. Plaintiff has no proof that anyone stole his claim forms, nor that the supposed theft was racially based. Similarly, the five-day suspension is supported by legitimate, non-discriminatory reasons. Plaintiff has failed to show any evidence of an intent to discriminate against him on the basis of his race. Because his race discrimination fails under Title VII, it also fails under section 1983 for purposes of the Equal Protection clause of the Fourteenth Amendment.

Plaintiff also claims that his due process rights were violated by various acts of defendants. Though plaintiff does not specifically explain how his due process rights were violated. The failure to promote did not violate his due process rights, since plaintiff has no property interest in the competitive promotion. Plaintiff seems to base his due process claim on his five-day suspension, which only came

about after an appropriate notice, Skelly hearing, Civil Service Commission appeal, and the thorough investigation by defendant Sara. Thus, plaintiff received full due process on his suspension. Plaintiff also points out that the suspension was originally based on two claims(threatening language and abuse of sick leave) and resulted in the same punishment based solely on the threatening behavior, after the sick leave was reduced to a warning. But this is not a violation of due process, since it was found during the hearings that the threatening behavior alone was sufficient for a five-day suspension, and the punishment was not in fact increased, as occurred in the case plaintiff relies on. See Stevenson v. Goldstein, 24 F.3d 666 (5th Cir. 1994).

Plaintiff claims violation of his Fourth Amendment right to be free from illegal search and seizure based on the November 9 incident of Hunter placing his hand on plaintiff's shoulder. This claim is unsustainable as a "seizure." Plaintiff also complains of an illegal interrogation by the Crisis Team officer who questioned him on November 14, 1995 after he threatened to "take Hunter's face off." There is no evidence that the "interrogation" was unwarranted or that the plaintiff was harmed by the officer's questioning, which did not lead to arrest or any other adverse action. Nor is there any reason that defendants should be liable for behavior by a Crisis Team officer.

Similarly implausible is plaintiff's claim of violation of his right to privacy because he was questioned and a report was written

regarding the November 14 incident. These normal investigative procedures, after a threat of violence, are not invasions of privacy.

Plaintiff also argues that his First Amendment rights were violated by defendants, who allegedly discouraged other employees from speaking with or consorting with plaintiff, and penalized plaintiff for whistle blowing and making comments about racial discrimination. The claim in only sustainable if plaintiff were able to prove a causal link between these activities and disciplinary action against him. But the failure of his retaliation claim shows that the two are not causally related. Plaintiff has no evidence to support his claim that defendants have placed a "chill" on other employees interacting with him, nor that this is in any way related to activities by plaintiff protected by the First Amendment. Once again, plaintiff's arguments are unsupported, since there is no evidence to show that any negative events or disciplinary actions were the result of speech protected by the Constitution.

D. Plaintiff's Motion for Partial Summary Judgement

Plaintiff moves for partial summary judgement on the issue of liability for his five-day suspension. The court assumes plaintiff is moving for summary judgement on his retaliation claim.

Plaintiff claims that because defendants failed to respond to his request for admissions in a timely manner, his requests are deemed admitted. More specifically, plaintiff wishes to deem admitted that plaintiff "was discipline[sic] in part for having filed charges of race

discrimination." If this were true plaintiff would have a case for retaliation under Title VII. But defendants did not file their admission late. It was discovered near the end of October 1997, just before the discovery responses were due, that the plaintiff had sent defendants a request for admission along with other discovery requests. Defendants were unaware of the request for admissions, could not locate it, and notified plaintiff of this fact prior to the date discovery responses were due. At a hearing on October 31, 1997, defendant received the request for admission directly from plaintiff, and agreed to expedite their responses. Defendants responded on November 19, 1997, well within the 30 day limit for discovery responses. Thus, the admissions were not untimely, and are not deemed admitted.

Absent the alleged admission, Plaintiff retaliation claim is not supported by any evidence. Plaintiff claims that defendant Sara stated as the Civil service Commission hearing on May 1, 1996 that one reason for disciplining plaintiff was the fact that plaintiff alleged racial discrimination. But the transcript of the hearing and Sara's affidavit prove otherwise.

The hearing testimony is as follows: "Q: Now ....did you ... decide to discipline Mr. Julien because you found there was o basis for his allegations of racial discrimination? A: You mean was that one of the factors? Q: Yeah? A: Ah, that was one of the factors, yeah, yeah." Plaintiff misinterprets this to mean that Sara disciplined plaintiff <u>because</u> he alleged racial discrimination. But Sara's

declarations clarify that he investigated plaintiff's claims of racial discrimination so that he could be sure there was no racial discrimination involved before suspending him, thus removing racial discrimination as a factor in Sara's decision to suspend plaintiff.

Plaintiff's attempt to deem his discovery admitted, along with his misinterpretation of Sara's testimony, are the only bases for his motion for partial summary judgment. Neither is sufficient.

V. CONCLUSION

For the above reasons, the court (1) GRANTS defendant's motion for summary judgement on all of plaintiff's claims, and (2) DENIES plaintiff's partial motion for summary judgement.

IT IS SO ORDERED.

DATED: July 17, 1998.

/S/CHARLES A.LEGGE

United States District Judge

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD A. JULIEN
Plaintiff-Appellant,

v.

COUNTY OF ALAMEDA, County of Alameda Office of Assessor; JOHN SCOTT; STEPHEN SARA; RONNIE THOMSEN; JOHN CLUGSTON; DARRYL EDWARDS; STEVE HUNTER
Defendants-Appellees.

No. 98-16401

D.C. No. CV-96-01858-CAL(JL)

MEMORANDUM[1]

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Submitted July 12, 1999[2]

Before: FARRIS, HAWKINS, AND GRABER, Circuit Judges.

Harold A. Julien, an appraiser employed by Alameda County, appeals pro se the district court's : (1) summary judgement for defendants on his claims under 42 U.S.C. § 1983 and Title VII of

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] Because we unanimously find this case suitable for decision without oral argument, we deny Julien's request for oral argument. See Fed. R. App. P. 34(a)(2).

the Civil Rights Act of 1964, 42 U.S.C. § 2000e, alleging retaliation and discriminatory non-promotion an account or race; (2) partial denial of his motion for leave to file an amended complaint, adding new defendants and new claims under 42 U.S.C. § § 1981, 1983, 1985(3) and 1986; (3) denial of his motion for recusal; and denial of his motion to tax costs. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgement. *See Barnett v. Centoni*, 31 F.3d 813, 815 (9th Cir. 1994)(per curiam). We review for abuse of discretion the denial of Julien's motion for leave to amend, *see Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765 (9th Cir. 1986), motion for recusal, *see Moideen v. Gillespie*, 55 F.3d 1478, 1482(9 th Cir. 1995) motion to compel discovery, *see Klingele v. Eikenberry*, 849 F.2d 409, 412 (9 th Cir. 1988), and motion to tax costs, *see National Info Servs. Inc v. TRW, Inc.*, 51 F.3d 1470, 1471 (9 th Cir. 1995). We affirm.

Because the defendants articulated a legitimate, non discriminatory reason for denying Julien the promotion and Julien failed to raise a material question of fact demonstrating a pretext, the district court properly granted summary judgement on his Title VII claim alleging disparate treatment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The district court also properly granted summary judgement on Julien's Title VII claim because the record failed to show that the promotion practice had a disparate impact on his protected class. *See Watson v. Forth Bank & Trust*, 487

U.S. 977, 994 (1988). Similarly, because defendants offered a legitimate, non discriminatory reason for the adverse action against Julien and he failed to raise a material question of fact as to pretext, the district court properly granted summary judgement on his retaliation claim. *See Tarin v. County of Los Angeles*, 123 F.3d 1259, 1264 (9th Cir. 1997).

The district court properly granted summary judgement on Julien's 42 U.S.C. § 1983 claims because Julien failed to establish a constitutional violation, *see Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), and because denial of his 42 US.C. § 1983 claim based on race discrimination in employment, *see St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1(1993)(finding Title VII and 42 U.S.C. § 1983 based on race discrimination in employment include the same purposeful discrimination element).[3]

The district court did not abuse its discretion when partially denying the proposed amended complaint because the denied amendments would have been futile. *See Gabrielson*, 785 F.2d at 766 (holding that amendment would be futile if it would have been defeated on summary judgement). Likewise, the district court did not abuse its discretion in denying the motion to compel discovery. *See Klingele*, 849 F. 2d at 412 (holding that denial of further discovery is

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[3] In granting defendants' motion for summary judgement, the district court properly denied Julien's motion for partial summary judgement which included the same issues.

not abuse of discretion if the discovery would not raise a genuine issue of material fact).[4] Because Julien failed to show any impropriety in his motion to tax costs, *see National*, 51 F.3d at 1472, or partiality in his motion to recuse the district court judge, *see Moiseen*, 55 F.3d at 1482, the district court did not abuse its discretion in denying those motions.

AFFIRMED.

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[4] The district court did not abuse its discretion in granting defendants' motion to withdraw their admission, finding the answer timely filed. *See Hardly v. U.S.*, 45 F.3d 1345, 1348(9 th Cir. 1995).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD A. JULIEN,

Plaintiff- Appellant,

v.

COUNTY OF ALAMEDA, County of Alameda Office of Assessor; JOHN SCOTT; STEPHEN SARA; RONNIE THOMSEN; JOHN CLUGSTON; DARRYL EDWARDS; STEVE HUNTER

Defendants-Appellees.

No. 98-16401

D.C. No. CV-96-01858-CAL(JL)
Northern California
(San Francisco)

ORDER

Before: FARRIS, HAWKINS, and GRABER, Circuit Judges

The panel has voted to deny Julien's petition for panel rehearing. Judges Hawkins and Graber vote to deny the petition for rehearing en banc, and Judge Farris so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fe. R. App. P. 35.

The petitions for panel rehearing and for rehearing en banc are denied. No further filings shall be accepted in this closed appeal.

Interrogatory 12 - Information regarding an incident between plaintiff and Sheriff's Deputy Mike Rodgers. Defendant objects on ground of relevance. Plaintiff claims that this deputy was supposed to have some expertise regarding plaintiff. This only refers to the fact that the deputy on more than one occasion has been asked to remove plaintff from meetings where he became disruptive. This has nothing to do with plaintff's calim against the Assessor's Office for failure to promote. Defendant does not have to answer this interrogatory

(THE ABOVE IS FROM A DISCOVERY ORDER ISSUED APRIL 2, 1998 FROM A HEARING OF APRIL 1, 1998. CORRECTLY THE ORDER NOTES IN THE CONTEXT ABOVE NO RELATIONSHIP EXIST BETWEEN THIS MATTER AND PROMOTION, THE ISSUE WAS A FALSE POLICE REPORT IN CONNECTION WITH A § 1983 CLAIM; RODGERS WAS DISMISSED AS A DEFENDANT EARLIER IN THE PROCEEDINGS. NO KNOWN MATERIAL WAS PRESENTED TO SUPPORT THIS "FINDING.")

APPENDIX - E

AFFIDAVIT

My name is Frances Jefferson and currently I am Acting Executive Director of the United Service Employees, Service Employees International Union Local 616. I also provide direct representation services to members in the Office of Assessor. Mr. Julien is a member of Local 616 and has been provided with representation service on grievance and disciplinary matters.

In July 1995 per Mr. Julien's request I inspected his personnel file maintained by the personnel unit, Office of Assessor. At that time hie personnel file contained no document pertaining to mileage claim forms. Subsequently, this matter was in part the basis for a five day disciplinary suspension of Mr. Julien. This fact was made known to Stephen Sara and Darryl Edwards in a Shelly hearing on December 18, 1995.

On May 1, 1996 I attended an Alameda County Civil Service hearing for a five (5) day suspension of Harold Julien. Discipline was imposed, in part, for his alleged actions concerning mileage claim forms. At the hearing the mileage claim issue was dropped from the list of charges following a motion by counsel for the appellant Antonio Ruiz. No action regarding the mileage claims was taken prior to the hearing, contrary to hearing officer Franklin Silver's report.

At this Alameda County Civil Service Disciplinary hearing Stephen Sara testified that Harold Julien had been disciplined in part for having file charges of racial discrimination.

It is my understanding that Harold Julien made internal complaint on August 28, 1997 to officials in the Office of Assessor regarding treatment accorded him and others that day. On October 21, 1997 I attended a meeting with Harold Julien regarding a performance evaluation. Ms. E. Evans, Chief Appraiser, and Mr. J. Clugston were in attendance. Mr. Julien asked if the complaints raised on August 28,1997 had been investigated. Ms. Evans responded that she had talked with all involved parties and found no basis for the complaints raised by Mr. Julien.

The number of issues and incidents that have occurrd over the last three(3) years and evidence of repeated and subtle attempts too intimidate and denigrate lend strong evidence to the existence of a hostile work environment.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this affidavit is executed in October 28, 1997 in Oakland, California

/s/ Frances Jefferson

APPENDIX - F
AFFIDAVIT

On May 1, 1996 I attended a Civil Service Commission Hearing that was held in regard Harold A. Julien, the Hearing Officer was Franklin Silvers. The disciplinary action taken was based on two charges.

The first dealt with mileage claim forms and it was dismissed at an early stage in the hearing. It was dropped on a motion by counsel Ruiz and was accepted by the Hearing Officer.

Later in testimony by Stephen Sara, he said that the discipline was imposed in part because Mr. Julien had made complaints of racial discrimination.

Present throughout the hearing were Francis Jefferson, Darryl Edwards, and attorneys Rutherford and Ruiz, in addition to Mr. Julien and I.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this affidavit is executed on October 27, 1997 in Oakland, California.

/s/ Mark Tornheim

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAROLD A. JULIEN Plaintiff-Appelant, vs. COUNTY OF ALANEDA; JOHN SCOTT; STEPHAN SARA; RONNIE THOMSEN; JOHN CLUGSTON; DARRYL EDWARDS; STEVE HUNTER, Defendants-Appelles	No. 98-16401 D.C. No. CV-96-1858-CAL(JL) PETITION FOR REHEARING PURSUANT TO FRAP 40 & PURSUANT TO FRAP35-1 SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC

Appeal from the Untied States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Harold A. Julien
Plaintiff-Appellant
1907 109th Ave
Oakland Calif. 94603

STATEMENT

Pursuant to **FRAP 40 PETITION FOR PANEL REHEARING**: the petition is based on: material points of fact and law overlooked or misapprehended with apparent conflicts with other decisions of the Court. These are addressed below.

Pursuant to **FRAP 35-1 SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC**: The panel decision conflicts with decisions of the Ninth Circuit and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. Citations: *Godwin v. Hunt Wesson, Inc.* 150 F. 3d 1217 (9th Cir. 1998) as regard summary judgement standards in actions alleging impermissible animus(sex; race, and so forth) and circumstantial evidence in such actions . *Washington v. Garrett* 10 F. 3d 1421, 1422 (9th Cir. 1993) with respect to substantive case law; pro se litigants; and discovery. *Ortez v. Washington County, State of Or.* 88 F. 3d 804 (9th Cir. 1996) with respect to pro se litigants, and amended complaints; and as regard recusal. *U.S. v. Bauer*, 75 F. 3d 1366 (9th Cir. 1996).

OVERVIEW

Plaintiff appealed summary disposition on claims under 42 U.S.C. § 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e with six named defendants; the denial of plaintiff's motion for partial summary judgement; rulings as regard what was

termed an amended complaint to include six named defendants(others) and claims under 42 U.S.C.§§ 1981, 1983, 1985(3) and 1986; and motions in regard to discovery, costs, and recusal by the district court. The district court was affirmed.

The decision was a MEMORANDUM without any factual reference to the record; the decision noted that the defendants offered nondiscriminatory reasons for their actions; the plaintiff failed to raise a material question of fact; and, no nor a suggestion of a fact from the respective arguments or the district court decision is in the MEMORANDUM. In sum the decision appears unfecundated, lacking reasoned disposition consistent with Circuit Rule 36-1.

Defendant supplied a three volume Supplemental Excerpts of the Record with 126 exhibits with an untold number of pages, and a brief; the district court docket indicated 132 entries. The plaintiff supplied a one volume Excerpt of the Record of 285 pages with an opening and reply brief. Plaintiff request for oral argument was denied. As much as practical the sequence below follow events in the district court.

DISCUSSION

a) <u>The Amended Complaint(s)</u>

Futility of amendment is the basis in the MEMORANDUM under *Gabrielson v. Montgomery Ward & Co.* 785 F.2d (9th Cir. 1986) This appeal is fully distinguishable from *Gabrielson*, whose

issue was health benefits precluded by the terms of the underlying trust; this mandated dismissal based on futility. The record before the circuit court did not have any ruling by the district court, the MEMORANDUM does not cite it's existence nor at any time have the defendants claim such occurred or exist; the defendants suggest futility but does not point to it in the record.

Above the phrase "what was termed as an amended compliant" refers to two separate action, CV-96-1858-CAL and CV-97-00128-CAL; these have been termed an amended complaint; this fact was noted in Appellant Opening Brief. The significance is that the district court ruled on a motion that did not entail the second suit.(It did, however, entail the causes of actions.) Generally, courts have "freely given leave to amended which is consistent with the intent of FRCP 15(a). *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Defendant resisted amendment based on various less than credible theories. The situation herein is similar to *Ortez*.

After granting Ortez leave to amend without prejudice due to deficiencies in the first through third amended complaints, the district court dismissed the fourth under FRCP 12(6)(b), Failure to State a Claim. In part the *Ortez* court reversed holding that Ortez had sufficiently plead claims under 42 § 1983 and Title VII. In this matter the initial compliant was a form provided by the district court, the controversy was on an amendment of the pro forma complaint;

it's duration lead to filling a second action encompassing the claims in the proposed amended complaint. Thus, the assertion that the district court ruling abrogated the second suit(CV-97-128-CAL) without actual consideration of the court. Irrespective of this abrogation , would the compliant then before the district court have withstood the tests articulated in *Ortez* ? ER 2:21-23

In this action the district court did not afford the plaintiff any opportunity to amend. Absence of discretion is an abuse of discretion; the district court granted defendant motion *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 691 (9th Cir. 1993). These material facts appear to have been overlooked by the panel: effectively the district court disposed of a second suit absent a specific ruling; nothing in the record indicate denial due to futility or any other reason nor does the defense dispute this fact. The often customary leave to amend was denied , and the panel ruling is counter to existing circuit law embodied in *Levald.*

If viewed with relevant case law under FRCP 12(b)(6), pro se litigant, multiple defendants, and claims under the CRA of 1964 and CRA of 1871 as articulated in *Ortez*, the district court was in error. In this case, the court noted " alleging that he engaged in protected activities of which his supervisors were aware shortly before they took adverse employment actions, Ortez sufficiently

alleges that his supervisors action were retaliatory in nature." *Id* at 809 In this proposed amended complaint the plaintiff alleged that a performance evaluation of 1994 received in 1995 was retaliatory; that Sara had disciplined the plaintiff for having filed charges of racial discrimination and imposing sick leave restriction at the same time; Sara's admission that plaintiff had been disciplined for having filed charges of racial discrimination not begin duly reported by Civil Service Commission hearing officer was retaliatory(a due process violation as well under Count IV § 1983; conspiracy under Count V § 1985). ER 8:29 to 15:9. At this point in time the operative question was sufficiency under *Levald* or *Ortez*, or were cognizable claims plead. Apparently, the absence of a district court ruling on the amended complaint was not noted by the panel.

b) Discovery

The district court discovery order was affirmed under *Klingle v. Eikenberry* 849 F. 2d 409 (9th Cir. 1988) It would appear inapposite as this case involved an incarnated pro se litigants who faced summary judgement motion without notice or an opportunity for discovery. A useful point from *Klingle* as in this appeal, the defendants resisted and contested all relevant discovery items which on it's face defies the purpose of discovery. As the court noted the

plaintiff had justified " his burden as to why and identified facts to show that the evidence existed" *Id* at 412.

In district court proceedings two rulings were central. One, the Order of the Magistrate court which denied *all* of plaintiff discovery requests. The central question as posed *Klingle* were the justification, and the identification of relevant facts. Magistrate Judge Larson asked a host of question at the April 1. 1998 discovery hearing, the bulk of the questions and replies concerned inquiry under *Monell.* A reading of the hearings transcript will confirm this fact. ER 92-115. On April 2, 1998 Magistrate Judge Larson's discovery order belie it's contents, and bore no relationship to hearing of the prior day. ER 119-129.

An absurdly invidious and odious creation of Magistrate Judge Larson is the following: " the fact that the deputy on more than one occasion has been asked to remove plaintiff from meetings where he became disruptive." ER 121: 2-6 Absolutely, nothing is the record from either party would lead to such a finding; the defendants have not advanced this finding as a basis for anything to this point. This was argued in the reply brief; it appears this may not have been observed. Given all facts related to this matter, it could be argued that such would constitute a prima facia case of racial animus.

The underlying issue was the alleged expertise of a deputy sheriff who had interrogated the plaintiff in the conference room of

the County of Alameda's Chief Administrative Officer(CAO). This formed the basis of allegation of false arrest and imprisonment. Inspite of numerous request to the Sheriff of the County of Alameda, except for a direct appeal to the Sheriff, no information other than a false police report was provided. The sequence of events were well documented and not disputed by the defendants ER 72 -78.

The district court found probably cause with respective to this matter; the fact overlooked this interrogation occurred in the conference room of the highest non-elected official of the County of Alameda, Susan Muranishi. The operative question is if the plaintiff was a threat as proclaimed; it is highly inconsistent to suspect violence but interrogate one in a chief officer's conference room.
Sara affirmatively answered an Interrogatory, No. 59, that established the fact that the plaintiff had requested representation prior to Rodgers interrogation. ER 169: 12. The lack of representation was a violation of plaintiff's "Weingarten" rights. ER 161: 3-22.

Magistrate Judge Larson's fictional creation mask these sets of facts; the fact is the record does not have any indication of the plaintiff being removed from any meeting for any purpose.

In overruling plaintiff's objection the district court notes that the Magistrate Judge "issued a detailed and reasoned order ..... reviewed each of the specific discovery decisions .... and concurs in those decisions." ER 138-139.

Second, the district court decision that ruling on all evidentiary motion were unnecessary. ER 225: 24 -26. In large part defendants summary judgement motion was supported by seven declarations, six from three defendants, and one from a personnel officer of the County of Alameda. Essentially, the personnel officers, Sims, declaration confirmed a central allegation that the County of Alameda Civil Service Commission ceded examination control to selection officials violating applicable Commission rules, and contradicted the declaration of defendant Edwards. ER 39: 2-12(Edward's declaration); ER 141:12 to 142: 15. (Plaintiff Motion to Strike).

Plaintiff motion to strike was under the mandate of FRCP 56(e) these declarations were inadequate for summary judgement and were "shams." ER 140-148. The most egregious is Sara' declaration that give his explanation of plaintiff's evidence. ER 52: 19-21, and ER 221:20 27 These attempt to discredit the declarations of Jefferson, ER 156-158, and Tornheim, ER 159-160; these declarations was conclusive evidence that Sara had made the statement that he had disciplined the plaintiff for having filed charges of racial discrimination. Literally, Sara's declaration proclaim that Jefferson and Tornheim ears mislead them. Nonetheless, the district court credited Sara's declaration, and ignored the declaration of Jefferson and Tornheim on this critical point. The district court wrote

"Absent the alleged admission, plaintiff's retaliation claim is not supported by any evidence." ER 236: 24-25.(the district court in this context refers to the Request for Admission under FRCP 36(a) that was not timely answered.) It appears that the panel overlooked the import of these facts.

The quintessential fact of the case: Sara's Admission! The MEMORANDUM disposes of this issue with footnote four " The district court did not abuse it discretion in granting defendants' motion to withdraw their admission, finding the answer timely filed." This assertions creates two problems.

First, the district court's decision noted the following " Both parties also filed motions objecting to evidence in the motions for summary judgement. The motions to strike the evidence need not be decided, because their resolution is immaterial to the determination of these motions for summary judgment." ER 225: 24-26. This decision by the district court is incongruent with the circuits pronouncement that the district court ruled on defendants motion.

Second, the districts court finding that answers were timely filed. This refers to defense counsel's "need for an extension" ER 219, and ER 211:10-11. The record does not contain nor does the district court or the defense point to the existence of the plaintiff agreement to such an extension. What the record does show is that the Request for Admission of Sara was served on September 29, 1997. ER 208.

Also, it contains the fact that the Request for Admission was timely received; this was by declaration of counsel Sloan-Morgan. ER 64: 13-19. Further, at ER 64: 21 counsel Sloan Morgan asserts on oath that she informed plaintiff on October 28, 1997; the record has no such letter. The record has a letter dated October 28, 1997 under the name of counsel Katano-Lee. The fact is 30 days from September 29, 1997 was October 29, 1997; discussion does not mean nor imply agreement. In short the district court adopted defense counsel reasoning in toto; the facts belie this finding; it appears the panel misapprehended these sets of facts.

c) Summary Judgement

In the MEMORANDUM the authority for summary judgement is an incarcerated pro se litigant case under FRCP 12(b)(6), Failure to State a Claim. *Barnett v. Centoni* 31 F.3d 813 (9th Cir. 1994) To the extent that such case law under FRCP 12(b)(6) is applicable, below it is argued the case law with a pro se litigant, multiple defendants, similar claims, (Title VII, 42 U.S.C. § 1983, retaliation) and dismissal under FRCP 12(6)(b) is useful to examine the dismissed claims never ruled on by the district court. *See Ortez v. Washington County, State of Or.* 88 F. 3d 804 (9th Cir. 1996).

A grant of summary judgement is reviewed de novo; while viewing the evidence in the light most favorable to the non-moving party; with an inquiry to determine if relevant substantive law was

correctly applied; and a review to assure that the district court did not weigh the evidence or determine the truth of the matter(internal citation omitted) *Washington v. Garrett* 10 F. 3d 1421, 1422 (9th Cir. 1993). In many respect *Washington* is on point, racial animus, testing practices; discovery disputes, and harassment for protected activity. The Ninth Circuit has no shortage of substantive case law relevant to the appeal and petition. *SEE Godwin v. Hunt Wesson, Inc.* 150 F. 3d 1217 (9th Cir. 1998) In *Godwin* this court collected cases to reaffirm it's standards under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973) and *St. Mary's Honor Center v. Hicks* 509 U.S. 502(1993). Principles and frameworks for employment related claims as herein are well established, and not embodied in *Barnett*.

Other circuits have done the same, notably the Eleventh and Third circuits applying the same standards; respectively *SEE Coml. v. Plantation Patterns* 106 F 3d 1519(11th Cir. 1997), cert.den 118 SCt 685, 139 LEd2d 632., and *Sheridan v. E.I. DuPont de Nemours and Co.* 100 F.3 1061(3rd Cir. 1996). Each is harmonious with seven others, including the Ninth Circuit citing *Washington* among others. In a recent opinion by Circuit Judge Graber a variety of principles and formulations used in *Godwin, Combs* and *Sheridan* are addresses, some useful herein. *Gilbrook v. City of Westminster* 99 C.D.O.S. 5641. Nonetheless, the MEMORANDUM employs

Barnett, it appears relevant law was overlooked and misapprehended as regard this appeal.

At the summary judgement stage Federal Rule of Civil Procedure 56(e) is relevant, and for practical purposes subsumed by the authorities noted above. On appellate review " the actual evidence offered by each party" is examined. *Wallis v. J.R. Simplot Co.* 26 F.3d 885, 889 (9th Cir. 1994); declaration of information and belief are insufficient. *Taylor v. List_* 880 F.2d 1040, 1045(9th Cir. 1989); and a district court is not entitled to weigh the evidence and resolve underlying factual issues. *Chevron Corp v. Pennzoil Co.* 974 F.2d 1156, 1161 (9th Cir. 1992). In sum, the relevant inquiry under FRCP 56(e) is admissibility at trial.

d) The Decision

Promotion: The district court noted that minorities fared better than Caucasian in Appraiser III promotions in 1994-1996 ER 231:26. The complaint address promotions in 1994 ER 14:8 What was termed the "oral selection board" were defendants Scott, Thomsen, and Clugston. Thomsen proclaimed the test as "just find" after his impermissible review of the examination. ER 54: 14-15 Defendants reasons for the denial of a promotion to the plaintiff were stated in a declaration of defendant Scott with no factual bases other than his assertion of his views of the discussion of the oral selections

board whose members were stated above. No evidence was provided other than Scott's declaration. In a motion to strike Objections were made. ER 140-148. Again as noted earlier the court did not rule on any evidentiary motions. As noted above declaration of information and belief are insufficient to support a motion for summary judgement. *Taylor v. List_* 880 F.2d 1040, 1045(9th Cir. 1989) Nonetheless, the district court credited Scott declaration which was the bias for summery judgement on the promotional claim.

In regard to plaintiff evidence the district court noted that a comparison fails to identify those out of the general population who are qualified to be Appraisers" ER 232: 1-2 It appears this is based on Edwards declaration. ER 21: 25 to 22-4; this was under oath and based on being informed , by whom is unknown nor is stated. Again, objections were made on the ground of admissibility and hearsay .ER 140-148. In the discovery disputes Interrogatories Nos. 4 and 8 was sought to answer the fact the district court noted. ER 93-94 (4/1/98 discovery hearing) In short denial of appropriate discovery request, and Edwards' declaration was used as the basis of the court finding on plaintiff's data. It appears that the panel misapprehend these facts as well.

Retaliation Claim: In sum the court found that the plaintiff did not establish the "but for" as regard protected activity. In *Gilbrook* the court noted this as the Mount Healthy question which is

a fact intense inquiry. *Id* at 5644. The district court notes "plaintiff shows no evidence to link these activities with his suspension" ER: 232- 27 to 233-1. The district court relies on Sara's declaration. The court overlooked plaintiff arbitrators award under CBA which established the "but for" as regard to defendant Hunter' behavior on evaluations, the incident of November 9, 1995 and sick leave restriction imposed by Sara; the district court as well avoids these facts. ER: 30. It would appear these factors were overlooked by the panel, also. In sum these facts create a material triable fact sufficient to defeat defendants summary judgement motion under *Godwin*.

Plaintiff Motion for Partial Summary Judgement: In short this motion was based on Sara's admission. Evidence from four separate sources were presented to support this motion. The district court overlooked two, declarations of Jefferson and Tornheim; obscured the May 1, 1996 hearing transcript that arguable was spoiled or tampered with by a person or persons unknown(the pause in the transcript);, and the fourth being the admission under FRCP 36(a) as earlier analyzed. The district court impermissibly weighted and credited Sara's declaration as noted in the following : Sara's declarations clarify..... ER 237: 5. The district court's actions are untenable and implausible given the foregoing.

It seems that the panel overlooked these facts as regard the plaintiff's motion for partial summary judgement.

e) Recusal

The Ninth Circuit standard is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might be reasonable questioned" *Herrington v. Sonoma Cty.*, 834 F. 2d 1244, 1503 (9th Cir. 1987). On appeal the plaintiff argued that the district court violated the local rules by not referring the matter to another judge. Local rules have the force of law and if substantial rights are affected, reversal is mandated. *Martel v. County of Los Angeles* 21 F. 3d 990 946-47 (9th Cir. 1994). In the Memorandum's supporting authority, the judge subject to the motion referred the motion to another judge for a decision; this would appear to support the plaintiff assertion. *Moideen v. Gillespie*, 55 F. 3d 1478, 1482(9th Cir. 1995). Reassignments are done as one court noted "Litigants are entitled to a fair trial and a perception that the presiding judge does not possess a bias that will affect ruling during the trial." *Montiel v. City of Los Angeles* 2. F.3d 335, 339 (9th Cir. 1993) The same judge was reassigned in *Kingvision v. Lake Alice* (No 96-56737).

The authority in the MEMORANDUM, *Moideen*, is a case about unfunded benefits which was the core issue of matters before the court; this court referred the motion to another judge; the relevant facts of this matter are more akin to *Kingvision* and *Montiel*

than *Moideen*. In a part of an opinion authored by Circuit Judge Farris, a pertinent ground for recusal is articulated: " the alleged bias must amount to animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct" *U.S. v. Bauer*, 75 F. 3d 1366 (9th Cir. 1996)(internal citation and quotations omitted) This formulation appears most relevant herein.

The fictional finding of Magistrate Judge Larson that police intervention was necessary to remove the plaintiff from meeting, and was confirmed by the district court would appear to meet this test. As regard to the Motion for Recusal the basic argument remains unchanged which are the handwritten remark the word "primarily" in the decision by the district court to suggest that the action was a promotional matter, and the lack of referral in violation of the local rules is sufficient ground for recusal. Absent recusal and under the supervisory powers of the circuit court, reassignment would appear appropriate.

COSTS

Although under Appellate rule, defendants actions as noted above demonstrate a tactic used in the lower court; i.e., bloat and confuse the record which is inconsistent with Circuit Rule 30-2. As was noted in objection to cost the defendant added about 25% to the docket which was bloat, this alone would indicate a reason to deny

cost as well as a 1020 page deposition done over five day's which was for investigative purposes. ER 259-262. No known published case has such in controversy.

SUMMARY

In this matter the district court gave a cursory glance at the traditional first amendment analysis and the " but for" analysis, made impermissible credibility determination; and it appears made all inference favorable to the defendants with respect to each dispostive motion.

Federal Rule of Civil Procedure 52(a) address the clearly erroneous standard; the Ninth Circuits standard is " a definite and firm conviction than a mistake has been committed" *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991); and *Knickerbocker v. City of Stockton* 81 F. 3d 907, 911 (9th Cir. 1996)(citing various authorities in employment actions) The foregoing does clearly suggest if this standard is applied, the petition would be granted.

CONCLUSION

In sum the actual issues herein are the rule of law and judicial integrity!

Respectfully Submitted,

Dated:

/s/ Harold A. Julien,
Plaintiff, Appellant & Petitioner

28 USC Rule 36. Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

(b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the

matter or set forth reasons why the party cannot admit or deny it. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

28 USC Rule 56. Summary Judgment

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, nswers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

28 U.S.C.Sec. 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported,

evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

42 U.S.C. Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC Sec. 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

The appellants assert that the district court should have taken into account the declaration of Yu, World Noon's director, to the effect that the $300,000 wired to Wong's trust account came from World Noon, not Topworth. In the district court the Receiver argued that the declaration was inadequate because it did not satisfy 28 U.S.C. S 1746(1), which states that an unsworn declaration executed outside of the United States must contain, "in substantially the following form . . . . `I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).' " The Yu declaration states "I declare the foregoing to be true and correct under penalty of perjury under the laws of Hong Kong or any applicable jurisdiction," and is dated, signed and notarized. The Receiver argued that the declaration is invalid because instead of "under the laws of the United States" it states "under the laws of Hong Kong or any applicable jurisdiction." The district court adopted the proposed finding that "[s]uch declaration is improper in form and is therefore inadequate to establish a basis for World Noon's claim."

The district court was mistaken. First, the declaration wasdeclared before a notary public, so S 1746 may not even apply. Second, S 1746 requires only that the declaration "substantially" comply with the statute's suggested language, and the phrase "under the laws of . . . any applicable jurisdiction" is substantially compliant with the statute's phrase "under the laws of the United States." See Schroeder v. McDonald, 55 F.3d 454, 460 n. 10 (9th Cir. 1995) (verification conformed with statute although language "did not follow S 1746's form with precision"); Trammell Real Estate Corp. v. Trammell, 748 F.2d 1516, 1518 (11th Cir. 1984) (declaration language "substantially similar" to language of S 1746 meets statute's requirements).

We therefore consider the declaration as part of the district court record.